

35633

SERVICE DATE – MARCH 3, 2005

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34667]

BNSF Railway Company C Acquisition and Operation C State of South Dakota

AGENCY: Surface Transportation Board.

ACTION: Notice of filing of application and request for public comments.

SUMMARY: BNSF Railway Company (BNSF)¹ has filed an application under 49 U.S.C. 10901 for authority to acquire and operate approximately 368 miles of railroad lines (referred to as the ACore Lines®) that are owned by the State of South Dakota (the State).² The Core Lines, which are described in a July 10, 1986 Operating Agreement between Burlington Northern Railroad Company (BN, a BNSF predecessor) and the State, extend principally: between milepost (MP) 777.0 near Aberdeen, SD, and MP 650.6 near Mitchell, SD; between MP 518.9 near Sioux City, IA, and MP 649.7 near Mitchell, SD; between

¹ Effective January 20, 2005, The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

² BNSF previously indicated that the Core Lines consist of approximately 369.7 miles of railroad lines. See The Burlington Northern and Santa Fe Railway Company C Acquisition and Operation Exemption C State of South Dakota, STB Finance Docket No. 34645 (STB served Jan. 19, 2005). The slight discrepancy (the 368 miles now indicated vs. the 369.7 miles previously indicated) has not been explained.

MP 293.1 near Canton, SD, and MP 650.6 near Mitchell, SD;³ between MPs 74.1 and 68.8 in Sioux Falls, SD; between MP 68.8 near Sioux Falls, SD, and MP 49.4 near Canton, SD; and between MPs 511.9 and 518.9 in Sioux City, IA.

DATES: Comments respecting the BNSF application must be filed by March 11, 2005. Replies to such comments must be filed by March 25, 2005.

ADDRESSES: Any filing submitted in this proceeding must be submitted **either** via the Board's e-filing format **or** in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's

www.stb.dot.gov website, at the [E-FILING](#) link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface

Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In

addition, one copy of each filing in this proceeding must be sent to each of the following (any such copy may be sent by e-mail or fax, but only if service by e-mail or fax is acceptable to the recipient): Adrian L. Steel, Jr., Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101

(phone: 202-263-3237; fax: 202-263-5237); and Sarah W. Bailiff,

BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131

(phone: 817-352-2354; fax: 817-352-2397).

³ The distance between MP 293.1 near Canton and MP 650.6 near Mitchell is approximately 81.50 miles. See BNSF's application, Exhibit B, Appendix 1 at 6. BNSF has not explained the discrepancy respecting the milepost designations.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar,
202-565-1609. [Assistance for the hearing impaired is available through the
Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Core Lines were once part of the
rail system operated by the Chicago, Milwaukee, St. Paul and Pacific Railroad
Company (the Milwaukee Road). The Milwaukee Road entered bankruptcy in
1977, and, in 1980, it received, both from the Interstate Commerce Commission
(ICC) and from the bankruptcy court, approval to abandon the Core Lines. In
March 1980, the Milwaukee Road terminated its Core Lines operations, and
thereafter, for more than a year, shippers located on the Core Lines had no rail
service of any kind. In 1981, the abandoned Core Lines were acquired by the
State, and, since on or about July 6, 1981, BN/BNSF has provided common
carrier rail service over the Core Lines pursuant to various agreements (the most
recent of which is the 1986 Operating Agreement) with the State,⁴ and pursuant to
a Modified Certificate of Public Convenience and Necessity (the modified
certificate) issued by the ICC. See 49 CFR Part 1150, Subpart C (' 1150.21
et seq.) (these are the Amodified certificate@regulations that apply to operations
over abandoned rail lines that have been acquired, through purchase or lease, by a
State).

A contractual dispute has arisen respecting the scope of the rights retained
by or granted to the State and/or BNSF under the 1986 Operating Agreement. On

⁴ BNSF advises that, under the 1986 Operating Agreement, it currently
operates over the Core Lines as a lessee (i.e., the 1986 Operating Agreement
provides for a lease of the Core Lines to BNSF).

June 29, 2004, BNSF advised the State that it desired to exercise its ~~A~~purchase option~~@~~right (said to be provided in the 1986 Operating Agreement) to acquire the Core Lines. The State apparently contends that the 1986 Operating Agreement gives BNSF no right to acquire the Core Lines and/or gives the State a right to allow other railroads to operate over the Core Lines. BNSF apparently contends that the 1986 Operating Agreement gives BNSF a right to acquire the Core Lines and gives the State no right to allow other railroads to operate over the Core Lines. The dispute concerning the various rights asserted by the State and BNSF is now the subject of litigation in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Civ. No. 04-470 (S.D. 6th Circuit).

The contractual dispute between BNSF and the State must be resolved by the court; that dispute will not be resolved by the Board. However, a related matter --- BNSF's request that the Board authorize BNSF to acquire and operate the Core Lines --- must be resolved by the Board. But even if the Board authorizes BNSF to acquire the Core Lines, that authorization is only permissive. If the South Dakota state court decides that BNSF does not have, under the 1986 Operating Agreement, a right to acquire the Core Lines, then any Board-granted authority cannot be exercised.⁵

On December 23, 2004, BNSF filed, in STB Finance Docket No. 34645, The Burlington Northern and Santa Fe Railway Company C Acquisition and

⁵ BNSF has acknowledged this point. See BNSF's application at 4: ~~A~~BNSF recognizes that it will need to prevail in acquiring the Core Lines from the State whether through voluntary conveyance by the State or involuntary conveyance as may be ordered by the state court before BNSF can acquire title to the Lines.~~@~~

Operation Exemption C State of South Dakota, a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the Core Lines. By decision served January 14, 2005,⁶ the Board rejected BNSF's ' 1150.31 exemption notice on the ground that the transaction contemplated by BNSF (the transfer of the Core Lines from Amodified certificate@status to ' 10901 Arailroad line@status) was not appropriate for consideration under the ' 1150.31 Aclass exemption@procedure. The Board explained that, whereas the ' 1150.31 class exemption typically applies to routine transactions that are not subject to substantial controversy and opposition, the transaction contemplated by BNSF was neither routine nor noncontroversial. Therefore, the Board required BNSF to file either a ' 10502 exemption petition or a formal ' 10901 application, in order to compile a record that would allow the Board to resolve the issues raised. The Board specified that BNSF should file a petition or an application as soon as possible; that BNSF should include, in this filing, its entire Acase in chief@; that the State should submit its reply to this filing no later than the 21st day after the date on which the filing was made; that the State should include, in this submission, its entire case; and that BNSF should submit its response to the State's reply no later than the 14th day after the date on which the reply was filed.

On February 18, 2005, BNSF filed, in STB Finance Docket No. 34667, BNSF Railway Company C Acquisition and Operation C State of South Dakota, a formal ' 10901 application. This application seeks authority, under 49 U.S.C.

⁶ The Burlington Northern and Santa Fe Railway Company C Acquisition and Operation Exemption C State of South Dakota, STB Finance Docket No. 34645 (STB served Jan. 14, 2005).

10901 and 49 CFR Part 1150, Subpart A (' 1150.1 et seq.), to acquire and operate the Core Lines. The formal application filed in STB Finance Docket No. 34667 contemplates the same transaction that was contemplated by the class exemption notice previously filed in STB Finance Docket No. 34645: the transfer of the Core Lines from Amodified certificate@status to ' 10901 Arailroad line@status.

As indicated in the decision served January 14, 2005, in STB Finance Docket No. 34645, comments respecting the BNSF application must be filed by March 11, 2005 (the 21st day after the date on which the application was filed), and replies to such comments must be filed by March 25, 2005 (the 14th day after March 11th).

The application filed by BNSF in STB Finance Docket No. 34667 is available for public inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, D.C. The application is also available for inspection at BNSF's offices, at 2500 Lou Menk Drive, in Fort Worth, TX. The application is also available for viewing and downloading at the Board's website, at Awww.stb.dot.gov.@ In addition, copies of the application may be obtained from BNSF's representatives (Adrian L. Steel, Jr., and Sarah W. Bailiff) at the addresses indicated above.

Board decisions and notices are available on the Board's website at Awww.stb.dot.gov.@"

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: March 2, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary